

Appellant, a 40-year-old electrician, injured his lower back on February 8, 2000 while lifting a 250-pound transformer from a truck to a loading dock. He filed a claim for benefits,

which the Office accepted for lumbar sprain. In its July 31, 2000 letter accepting the claim, the Office advised:

“When you return to work, or obtain new employment, notify this [O]ffice right away. If you receive a compensation check which includes payment for a period you have worked, *return it to us immediately to prevent an overpayment of compensation.*” (Emphasis added.)

The Office paid appellant appropriate compensation for total disability and placed him on the periodic rolls. Appellant returned to full duty without restrictions with the employing establishment on November 6, 2000. The Office, however, continued to pay him temporary total disability compensation until January 27, 2001.

By letter dated June 4, 2007, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$6,028.30 covering November 6, 2000 through January 27, 2001. The Office found that appellant was at fault in creating the overpayment because he should have known that he was not entitled to receive compensation payments after he returned to work.¹ The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office, or request a prerecoupment hearing with the Branch of Hearings and Review. Appellant did not respond to this letter within 30 days.

In a decision dated December 21, 2007, the Office finalized the preliminary determination regarding the overpayment of \$6,028.30. The Office stated that appellant should have been aware that he was not entitled to receive compensation checks after he returned to work on November 6, 2000.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under the Federal Employees' Compensation Act is payable when the employee starts to lose pay.² Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.³

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period November 6, 2000 through January 27, 2001. The record shows that appellant received an overpayment during the period in question because he

¹ The Office noted that it had previously issued a preliminary notice of overpayment on June 28, 2001, in the amount of \$4,120.41, which it finalized on February 24, 2003. Appellant made a payment of \$712.83 towards the overpayment. On September 3, 2004 the U.S. Treasury returned this debt to the Office for recalculations and due process application as “the overpayment file contained incongruent amounts.”

² 20 C.F.R. § 10.401(a) (2003).

³ 20 C.F.R. § 500(a) (2003).

continued to receive checks for temporary total disability compensation after returning to full-time work on November 6, 2000 until January 27, 2001. Based on this determination, the Office properly found that appellant received an overpayment of compensation during that period.

However, the Office did not provide sufficiently detailed calculations to support how it arrived at the stated overpayment of \$6,028.30. It stated that it calculated the overpayment by taking appellant's effective pay rate as of February 16, 2000, \$852.86, and totaling the amount of temporary total disability compensation appellant received from November 6, 2000 to January 27, 2001, which amounted to \$6,741.66, and subtracting the amount appellant previously paid toward settlement of the overpayment, \$712.83, for a total overpayment of \$6,028.30. The Board notes however that appellant was overpaid for a period of eleven weeks. Given appellant's pay rate and the amount of weeks appellant was overpaid, the Board is unable to determine from these calculations the precise method by which the Office arrived at the total overpayment of \$6,028.30. Thus, this case must be remanded for the Office to clarify the method by which it calculated appellant's overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁴ provides that an overpayment must be recovered unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.⁵

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to provide information which the individual knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.⁶

⁴ 5 U.S.C. § 8129(a)-(b).

⁵ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁶ 20 C.F.R. § 10.433(a).

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he knew or should have been expected to know he was not entitled.⁷ Appellant was informed by the Office on July 31, 2000 that he was to immediately report to the Office to return to work and return any compensation received after a return to work or otherwise an overpayment of compensation would be created. He returned to work on November 6, 2000 but did not return any compensation received after that date, even though he knew or should have known that an overpayment would be created if he accepted compensation benefits after his return to work.

The Board has held however that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his account, as the acceptance of the resulting overpayment lacks the requisite knowledge.⁸ After appellant's receipt of the first direct deposit, for which fault may not be imputed to him, it could be presumed that he knew the amount of compensation contained in subsequent direct deposit checks exceeded the amount to which he was entitled. Therefore, for receipt of the first direct deposit, the Board finds that appellant was without fault. While appellant accepted the overpayment by gaining control of the funds deposited into his checking account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into his account, appellant was not on notice of the amount of the payment until after it was deposited electronically into his account.

On remand, therefore, the Office must determine the amount of the first direct deposit appellant received after he returned to work on November 6, 2000. However, as appellant was at fault under the third standard outlined above, after the first direct deposit payment, recovery of the overpayment of compensation following receipt of the second deposit may not be considered for waiver. Thus, the December 21, 2007 Office decision is affirmed in part, as modified, and remanded in part, in accordance with the findings above.

⁷ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁸ That Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months, with clear knowledge that the payments are incorrect. See *George A. Hirsch*, 47 ECAB 520 (1996); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002). The Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office, or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment. In the instant case, by the time appellant accepted the February 18, 2006 check -- the second direct deposit check containing an overpayment -- a sufficient amount of time had passed for appellant to become aware of the fact that the checks contained an overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period November 6, 2000 through January 27, 2001. The Board remands to the Office for clarification of the method by which it determined the amount of appellant's total overpayment. The Board finds that the Office improperly found that appellant was at fault for the initial direct deposit paid after November 6, 2000, but properly found appellant was at fault for the second direct deposit paid and all others paid through January 27, 2001. The case is remanded for determination of waiver and the amount of waiver on the portion of the overpayment for which appellant was found to be without fault.

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2007 decision of the Office of Workers' Compensation Programs be affirmed, as modified, and remanded in part, in accordance with this decision.

Issued: August 11, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board